

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

ZENIMAX MEDIA INC. and  
ID SOFTWARE LLC,

Plaintiffs,

V.

OCULUS VR, LLC,  
PALMER LUCKEY,  
and FACEBOOK, INC.

Defendants.

§ § § § § § § § § § § § § § § §

**CIVIL CASE NO. 3:14-cv-01849-P**

**PLAINTIFFS' SUR-REPLY IN FURTHER OPPOSITION TO  
DEFENDANTS' MOTION FOR PROTECTIVE ORDER**

Plaintiffs submit this sur-reply to succinctly address the following assertions set forth in Defendants' reply in support of their Motion for Protective Order (Dkt. No. 253):

1. Defendants state that "even after Defendants filed this motion, Plaintiffs served another round of 12 deposition notices without first asking Defendants to provide available dates for the depositions." (Dkt. No. 253 at 2.)

- Defendants omit that the November 3 e-mail enclosing those notices stated:

"I've also included associated deposition notices for witnesses in January. As before, while we would like these dates, they are placeholders and I again offer you a calendar to mark up and return. In other words, if any of the dates on the calendar for any of your witnesses work, please confirm, and if any dates don't work please provide alternative dates as soon as practicable. I look forward to working with you to continue scheduling depositions." (App'x (Dkt. No. 246-1) at 58 (emphasis in original).)

- Defendants have not confirmed any of the dates proposed by Plaintiffs for the depositions of those witnesses, and have proposed an alternative date for only one of those depositions. (Sur-Reply App'x Ex. 1 at 2.)

2. With respect to the particular deponents as to which Defendants seek relief:

a. Defendants assert that they "offered two potential dates for the deposition of **Brant Lewis**, an Oculus software developer — December 4, and 15 — but Plaintiffs did not accept either date." (Dkt. No. 253 at 2.)

- Defendants did not propose any date for the deposition of Mr. Lewis until November 3, 2015, after they had filed their Motion for Protective Order, and after this Court had entered its Order encouraging the parties to confer regarding deposition dates. (App'x (Dkt. No. 246-1) at 58 (first proposing a date for Mr. Lewis on November 3, 2015).)
- Defendants acknowledge that in view of the parties' discussions following that proposal, Plaintiffs have advised that "that they are no longer standing on their deposition notice to Mr. Lewis." (Dkt. No. 253 at 2 n.2.)

b. Defendants assert that "[o]n November 6, Defendants' counsel informed Plaintiffs that **Palmer Luckey**, Oculus's founder, is available for deposition on January 26, 2016, but Plaintiffs have not confirmed this date for his deposition." (Dkt. No. 253 at 2.)

- Defendants did not propose any date for the deposition of Mr. Luckey until November 6, 2015, after they had filed their Motion for Protective Order, after the Court had entered its Order encouraging the parties to confer regarding deposition dates, and after Plaintiffs had opposed Defendants' motion for protective order.
- Upon receiving Defendants' proposal, Plaintiffs promptly requested an alternative date for Mr. Luckey in view of the fact that the date proposed by Defendants "is sandwiched between dates for two other witnesses we have noticed." (Sur-Reply App'x Ex. 1 at 3.)
- Defendants have thus far declined to provide any alternative date for Mr. Luckey's deposition. (*Id.* at 2.)

c. Defendants assert that "[o]n November 3, Defendants' counsel informed Plaintiffs that **Brendan Iribe**, Oculus's Chief Executive Officer, is available for deposition on February 4, 2016, but Plaintiffs have not confirmed this date for his deposition." (Dkt. No. 253 at 2.)

- Defendants did not propose any date for the deposition of Mr. Iribe until November 3, 2015, after they had filed their Motion for Protective Order, and

after the Court had entered its Order encouraging the parties to confer regarding deposition dates. (App'x (Dkt. No. 246-1) at 57.)

- Upon receiving that proposed date, which was three months away, Plaintiffs promptly inquired whether Mr. Iribe — who is Oculus's CEO and a critical witness — might be presented sooner. (*Id.*)
- Defendants have thus far declined to provide any sooner alternative date for Mr. Iribe's deposition. (Sur-Reply App'x Ex. 1 at 2.)

d. Defendants assert that "[o]n November 5, Defendants' counsel informed Plaintiffs that **Laird Malamed**, Oculus's Chief Operating Officer, is available for deposition on February 10, 2016, but Plaintiffs have not confirmed this date for his deposition." (Dkt. No. 253 at 2.)

- Defendants did not propose any date for the deposition of Mr. Malamed until November 5, 2015, after they had filed their Motion for Protective Order, and after the Court had entered its Order encouraging the parties to confer regarding deposition dates. (Sur-Reply App'x Ex. 1 at 4 (first proposing a date for Mr. Iribe on November 5, 2015).)
- Plaintiffs have informed Defendants that they will proceed on the date that Defendants have now proposed for Mr. Malamed's deposition.

3. Defendants assert that "Plaintiffs also have largely failed to respond to Defendants' offered deposition dates or cooperate with Defendants." (Dkt. No. 253 at 2.) Plaintiffs respectfully submit that the record before the Court refutes that assertion, and that Defendants should be granted no relief on their Motion.

Dated: November 16, 2015

Respectfully submitted,

P. ANTHONY SAMMI  
E-mail: Anthony.Sammi@skadden.com  
KURT WM. HEMR  
E-mail: Kurt.Hemr@skadden.com  
JAMES Y. PAK  
Texas State Bar No. 24086376  
E-mail: James.Pak@skadden.com  
KRISTEN VOORHEES  
E-mail: Kristen.Voorhees@skadden.com  
DEVIN A. KOTHARI  
E-mail: Devin.Kothari@skadden.com  
(the foregoing attorneys admitted *pro hac vice*)  
**SKADDEN, ARPS, SLATE,  
MEAGHER & FLOM LLP**  
Four Times Square  
New York, New York 10036  
Telephone No.: 212-735-3000  
Facsimile No.: 212-735-2000

s/ Phillip B. Philbin  
PHILLIP B. PHILBIN  
Texas State Bar No. 15909020  
E-mail: phillip.philbin@haynesboone.com  
MICHAEL D. KARSON  
Texas State Bar No. 24090198  
E-mail: michael.karson@haynesboone.com  
**HAYNES AND BOONE LLP**  
2323 Victory Avenue, Suite 700  
Dallas, Texas 75219  
Telephone No.: 214-651-5000  
Facsimile No.: 214-651-5940

*Attorneys for Plaintiffs*  
*ZeniMax Media Inc. and id Software LLC*

**CERTIFICATE OF SERVICE**

On November 16, 2015, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case files system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

Dated: November 16, 2015

*s/ Phillip B. Philbin*

Phillip B. Philbin